No. 07-847

In the Supreme Court of the United States

S. MICHAEL BENDER, PETITIONER

v.

JONATHAN W. DUDAS, DIRECTOR,
PATENT AND TRADEMARK OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Patent and Trademark Office (PTO) exceeded its authority in disciplining petitioner for ethics violations that were related to his prosecution of patent applications.

2. Whether PTO's administrative issuance of Requirements for Information was unlawful and, if so, whether it tainted petitioner's subsequent disciplinary proceeding.

3. Whether other errors occurred in petitioner's administrative disciplinary proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 490 F.3d 1361. The opinion of the district court (Pet. App. 21a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2007. The petition for rehearing was denied on September 27, 2007 (Pet. App. 84a-85a). The petition for a writ of certiorari was filed on December 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress granted the United States Patent and Trademark Office (PTO) authority to issue regulations

that "govern the * * * conduct of agents, attorneys, or other persons representing applicants or other parties before the Office." 35 U.S.C. 2(b)(2)(D). Congress further specified that PTO "may, after notice and opportunity for a hearing, suspend or exclude * * * from further practice before [PTO], any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title, or who shall * * * with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before this Office." 35 U.S.C. 32.

Pursuant to formal notice-and-comment rulemaking procedures, PTO issued regulations establishing a Code of Professional Responsibility for practitioners representing applicants or others before the Office. See 37 C.F.R. 10.20 *et seq.* One of those disciplinary rules specifies that a practitioner "shall not * * * neglect a legal matter entrusted to the practitioner." 37 C.F.R. 10.77(c). Another rule instructs practitioners to avoid conflicts of interest and influence by persons other than the client, stating that "[e]xcept with the consent of a client after full disclosure, a practitioner shall not accept employment if the exercise of the practitioner's professional judgment on behalf of the client will be or reasonably may be affected by the practitioner's own financial, business, property or personal interests." 37 C.F.R. 10.62(a). Thus, "[e]xcept with the consent of the practitioner's client after full disclosure, a practitioner shall not * * * [a]ccept compensation from one other than the practitioner's client for the practitioner's legal services to or for the client." 37 C.F.R. 10.68(a)(1). A fur-

ther disciplinary rule prohibits practitioners from "engag[ing] in conduct that is prejudicial to the administration of justice." 37 C.F.R. 10.23(b)(5).

2. In 1993, petitioner assumed the prosecution of over 1000 design patent applications before PTO under an employment agreement with American Inventors Corporation (AIC), an invention submission company. Pet. App. 4a, 6a. AIC promised to patent and market an inventor's idea in exchange for approximately $9000. See *id.* at 4a; C.A. App. 4661-4664. The company agreed to hire a patent attorney to prepare, file, and prosecute an application on the inventor's behalf and to pay all legal fees associated with the design application. Pet. App. 4a. The company also promised a full money-back guarantee if a patent did not issue. *Ibid.*

AIC hired petitioner to take over the prosecution of the pending applications because the patent attorney who previously handled the cases, Leon Gilden, had been suspended from practice based on his actions concerning those applications. Pet. App. 5a-6a. Gilden's misconduct included filing applications for design patents instead of utility patents for some inventors. Gilden also had draftsmen add ornamentation to the figures in the patent applications in order to make them appear worthy of design patent protection. *Id.* at 5a. "Utility patents afford protection for the mechanical structure and function of an invention whereas design patent protection concerns the ornamental or aesthetic features of a design." *Carman Indus., Inc.* v. *Wahl*, 724 F.2d 932, 939 n.13 (Fed. Cir. 1983). Where an invention is functional as opposed to ornamental, therefore, utility patents provide the appropriate protection.

Because of Gilden's misconduct, PTO sent each of petitioner's clients a Requirement for Information (RFI)

asking the applicants, among other things, whether they invented the patterns on the drawings, whether they intended to apply for a design patent rather than a utility patent, and whether they understood the difference between a design and a utility patent. Pet. App. 5a. The majority of responses indicated that the inventors either did not understand the difference between a design and a utility patent or that they intended to apply for a utility patent. See *id.* at 6a. Nonetheless, petitioner prosecuted the applications as design patent applications after removing the improper embellishments. *Ibid.* AIC paid petitioner up to $15,000 bi-weekly for his services. *Ibid.*

PTO ultimately issued final rejections of the applications. Petitioner failed, however, promptly to notify his clients of the final rejections. Instead, he delayed mailing the notices to some of the inventors until after the period for response had expired. See Pet. App. 12a.

3. PTO initiated an investigation of petitioner after receiving information indicating that he might have violated PTO's Code of Professional Responsibility. Pet. App. 7a. During the investigation, PTO sent petitioner a number of RFIs posing questions about his actions and conduct. *Ibid.* After the Committee on Discipline determined that probable cause existed to bring charges against petitioner for violations of various disciplinary rules, the agency issued an administrative complaint alleging that petitioner committed neglect in violation of 37 C.F.R. 10.77(c), engaged in conflict of interest in violation of 37 C.F.R. 10.62(a) and 10.68(a)(1), and engaged in conduct prejudicial to the administration of justice in violation of 37 C.F.R. 10.23(b)(5). Pet. App. 7a-8a.

The charges against petitioner were heard by an administrative law judge (ALJ) during a three-day hear-

ing. See Pet. App. 7a. The ALJ found that petitioner had violated numerous PTO disciplinary rules and that exclusion from practice was warranted. *Ibid.* Upon review, the PTO General Counsel issued a final decision that adopted some of the violations found in the ALJ's initial decision and sustained the sanction of exclusion. *Ibid.* Specifically, the General Counsel concluded that petitioner had neglected an entrusted legal matter in violation of 37 C.F.R. 10.77(c); accepted employment where professional judgment may be affected in violation of 37 C.F.R. 10.62(a); accepted compensation from a person other than a client without full disclosure to the client in violation of 37 C.F.R. 10.68(a)(1); and engaged in conduct that was prejudicial to the administration of justice in violation of 37 C.F.R. 10.23(b)(5). Pet. App. 7a-8a.

4. Petitioner sought review of PTO's final decision in the United States District Court for the District of Columbia. The district court granted summary judgment for PTO. Pet. App. 21a-83a.

Among its other holdings, the district court rejected petitioner's argument that PTO lacked statutory authority to discipline attorneys for conduct such as that engaged in by petitioner. Pet. App. 35a-39a. The court explained that the statutes that authorize PTO's disciplinary regulations are "broad," and that, while the statutes are "vague as to the outer limits of the authority intended by Congress," PTO's interpretation was entitled to deference. *Id.* at 38a.

On the merits, the district court held that substantial evidence supported each of the disciplinary-rule violations found by PTO and that PTO's interpretations of its disciplinary regulations were reasonable. The court agreed with PTO that petitioner: (1) committed neglect

by failing properly to advise his clients; (2) engaged in conflict of interest by not disclosing the extent of his relationship with AIC to the inventors; and (3) prejudiced the administration of justice by giving evasive answers to PTO's RFIs. Pet. App. 44a-54a.

The district court also rejected numerous objections that petitioner raised to the administrative proceedings. Pet. App. 28a-34a, 55a-82a.

5. The court of appeals unanimously affirmed. Pet. App. 1a-20a. The court rejected petitioner's arguments that substantial evidence did not support PTO's findings that he violated various disciplinary rules. Specifically, the court agreed with PTO that petitioner, by neglecting to advise his clients on how best to protect their inventions and by neglecting to inform them promptly of PTO's final rejections of their applications, had violated 37 C.F.R. 10.77(c). Pet. App. 13a. The appeals court also determined that petitioner had "fail[ed] to point to any indication in the record that he met the disclosure requirements of 37 C.F.R. §§ 10.62(a) and 10.68(a)(1)" concerning the conflict of interest created by his retention by AIC to prosecute patent applications on behalf of individual inventors. Pet. App. 13a-14a. The court further concluded that petitioner's "failure to respond * * * in any meaningful way" to PTO's "specific questions directed to [his] relationship with [AIC] and his disclosure of that relationship to his clients" was "evasive conduct prejudicial to the PTO's investigation," in violation of 37 C.F.R. 10.23(b)(5). Pet. App. 15a.

The court of appeals also rejected petitioner's contention that the disciplinary measures at issue exceed PTO's statutory authority because they relate to client communications that were not made "before" PTO. Pet. App. 15a-16a. The court held that the challenged regu-

lations "are well within the scope of the enabling statutes," and that, "[t]o the extent the phrase 'before the Office' in sections 2 and 32 is ambiguous, * * * the PTO's reasonable interpretation of that phrase as authorizing regulations that govern a patent attorney's communications with and disclosures to a client in connection with the prosecution of applications before the PTO" is entitled to deference. *Id.* at 16a.

The court of appeals then rejected petitioner's various procedural arguments. Pet. App. 16a-17a.

ARGUMENT

The court of appeals' decision upholding PTO's disciplinary action against petitioner is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 15) that PTO exceeded its statutory authority because his unethical conduct was not "reasonably related to any proceeding pending before the PTO." That contention is mistaken because, on the record of this case, all of the ethics violations related to petitioner's prosecution of patent applications before PTO. In any event, there is no conflict in authority on that question.

Congress granted PTO authority to issue regulations that "govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office." 35 U.S.C. 2(b)(2)(D). Congress further specified that PTO "may, after notice and opportunity for a hearing, suspend or exclude * * * from further practice before [PTO], any * * * attorney * * * who shall * * * with intent to defraud in any manner, deceive, mislead, or threaten any applicant or

prospective applicant, or other person having immediate or prospective business before the Office." 35 U.S.C. 32.

Petitioner was retained to prosecute pending patent applications when the attorney who had been prosecuting those applications was suspended from practice. See Pet. App. 5a-6a. Thus, all of the relevant conduct was "reasonably related to [a] proceeding pending before the PTO" (Pet. 15)—the ongoing patent prosecutions. And even if the patent applications had not been filed, PTO would still have authority to regulate conduct related to potential applications. Section 32 makes clear, for example, that PTO's disciplinary authority extends to an attorney's communications with "any applicant *or prospective applicant*, or other person having immediate *or prospective* business before [PTO]." 35 U.S.C. 32 (emphases added).

Petitioner claims (Pet. 15) that his unethical communications (and lack of meaningful communications) with his clients did not relate to "the conduct of proceedings in the Office" because they occurred "out of the Office." That is mere word play. The question is not *where* conduct occurred—even false submissions to PTO are typically prepared and mailed to PTO from outside of PTO's offices. Instead, Congress authorized PTO to "govern the * * * conduct of" persons like petitioner, *i.e.*, "agents, attorneys, or other persons representing applicants or other parties before the Office." 35 U.S.C. 2(b)(2)(D). Under that provision, an attorney must "represent[] * * * parties before the Office." *Ibid.* But the phrase "before the Office" does not modify "conduct," and thus does not require that the specific conduct occur on PTO's premises or in the presence of PTO officials.

Indeed, the statutes go on to confirm that PTO's authority reaches attorneys' conduct toward "prospective"

applicants, 35 U.S.C. 32, and that PTO's regulations may require practitioners to be "possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office." 35 U.S.C. 2(b)(2)(D). As the court of appeals explained, "the language of those statutes indicates that they are broadly directed to service, advice, and assistance in the prosecution or prospective prosecution of applications." Pet. App. 15a. In any event, the ethics violations here included not only petitioner's communications to his clients (or lack thereof), but also his evasive answers to RFIs propounded by PTO concerning, among other things, pending patent applications. See *id.* at 14a-15a.

Even if the statutory phrase "before the Office" were ambiguous, the court of appeals correctly held that PTO's reasonable interpretation would be entitled to deference. Pet. App. 16a; see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Petitioner argues (Pet. 14) that PTO's disciplinary measures must reach no farther than necessary to accomplish federal objectives. Even assuming *arguendo* that is correct, but see pp. 10-11, *infra*, PTO has an obvious federal interest in regulating attorneys' unethical communications to their clients in connection with patent applications.

That interest is illustrated by the facts of this case. As the court of appeals explained, "[t]he background of this case reads like a novel but represents the true story of hopes dashed, fees wasted, and dreams lost by hundreds of individual inventors caught up in the world of self-interested promoters who promise the world and deliver very little." Pet. App. 2a. Petitioner, a solo practitioner, simultaneously accepted responsibility for

prosecuting over 1000 design patent applications (with 1000 different inventors) from a third party, AIC, which was not an inventor or assignee of any of the applications. See *id.* at 4a. Petitioner failed to disclose fully to his clients the nature and extent of his financial relationship with the company, failed to advise his clients of the most meaningful type of patent application available for their particular inventions (a utility patent), failed to notify his clients of PTO's denial of their applications until after the period to respond had expired, and earned up to $7500 per week from AIC for doing so. See *id.* at 5a-6a, 10a-15a.[1]

Nor does this case present any Tenth Amendment issue under *Sperry* v. *Florida*, 373 U.S. 379 (1963), as petitioner contends (Pet. 17-18). *Sperry* held that a *State* could not impose additional licensing restrictions beyond those required by federal law to permit a practitioner to practice before PTO. 373 U.S. at 385. *Sperry* in no way held that *PTO* is precluded from regulating an attorney's conduct in connection with patent applications. Moreover, the federal proceedings here do not preempt state law, as petitioner asserts (Pet. 14). PTO only barred petitioner from practicing before PTO; the appropriate state bar remains free to decide whether to impose additional discipline. See 37 C.F.R. 10.1.

Petitioner's reliance (Pet. 15 n.8) on *Kroll* v. *Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001), only underscores that point. *Kroll* held that the federal courts lacked sub-

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[1] While petitioner contends (Pet. 15) that *In re Daniels*, 144 F.3d 1452 (Fed. Cir. 1998), shows that he acted ethically before PTO, that case holds only that a change in the application for a design patent did not defeat the application's priority date. *Id.* at 1457. *In re Daniels* did not address any of the attorney misconduct or other issues presented here.

ject matter jurisdiction to consider the contention that *state* disciplinary action was preempted by federal patent law. *Id.* at 1365-1366. In so holding, the Federal Circuit determined that Section 2(b)(2)(D) "grants [PTO] broad authority to discipline patent practitioners for incompetence and a wide range of misconduct, much of which falls within the disciplinary authority of the states." *Id.* at 1365. As *Kroll* explained, however, "[t]hat the PTO and the states may share jurisdiction over certain disciplinary matters * * * does not mean that the states' authority is preempted." *Ibid.* Rather, the States generally retain authority to discipline attorneys, including patent practitioners. 37 C.F.R. 10.1.

Petitioner also misses the mark (Pet. 18-19) in claiming that he was unfairly targeted for discipline. Gilden was suspended based on his unethical activities in connection with the very patent applications at issue here. Pet. App. 5a-6a. When petitioner took over those prosecutions, working for the same company, he unapologetically continued most of the same abusive practices—while committing additional ethics breaches—and thereby contributed to the "hopes dashed, fees wasted, and dreams lost" to which the court of appeals referred. *Id.* at 2a, 6a; cf. *id.* at 59a ("[T]he facts of this case do not rise to a level that would warrant a finding that there was prejudgment or institutional bias against [petitioner]."); *id.* at 60a.

2. Petitioner contends (Pet. 19-23) that PTO acted unlawfully by sending RFIs to him as part of the investigation that preceded the initiation of disciplinary action. While petitioner asserts (Pet. 20-22) that the RFI process lacks adequate procedural safeguards, the court of appeals correctly recognized that, "when governmental action does not partake of an adjudication, as for exam-

ple, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." Pet. App. 17a (quoting *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960)).

Petitioner's reliance on *Goldstein* v. *Moatz*, 364 F.3d 205 (4th Cir. 2004), is misplaced. As the decision below explains, *Goldstein* held that federal officials were not entitled to absolute (as opposed to qualified) immunity from liability in a lawsuit challenging the issuance of RFIs. *Id.* at 211-217; see Pet. App. 16a-17a. The court of appeals reasoned that, in deciding whether to confer absolute immunity, "we should consider whether the system in question contains adequate procedural safeguards, such that private litigation is unnecessary to protect constitutional standards." *Goldstein*, 364 F.3d at 217. The court concluded that PTO's investigatory procedures regarding the use of RFIs lacked "sufficient procedural safeguards" to justify an absolute bar against private litigation. *Id.* at 217-219. The court did not determine the lawfulness of the RFIs, however, but instead remanded for application of the qualified immunity standard. *Id.* at 212 n.11, 219. And the court of appeals later held that the *Goldstein* plaintiff was not entitled to attorney's fees precisely because he was not a prevailing party. *Goldstein* v. *Moatz*, 445 F.3d 747, 751-752 (4th Cir. 2006).

In any event, the petitioner here did not object to the RFIs when they were propounded, but instead answered them. See Pet. App. 34a ("It * * * appears that [petitioner] is raising his claim about the general impropriety of RFIs for the first time in his appeal to [the district court]."). While petitioner now argues (Pet. ii, 21-22) that PTO's use in disciplinary proceedings of evidence gleaned from RFIs gave rise to an "'improper taking'

under the Fifth Amendment," he cites no authority for that unusual proposition. Cf. Pet. App. 34a n.8 (holding that "exclusion pursuant to the exclusionary rule is not an appropriate remedy in administrative proceedings").

3. Petitioner argues (Pet. 23-25) that PTO violated his due process rights by adding "a new charge"—giving evasive answers to RFIs that prejudiced the administration of justice—"after the administrative hearing" had concluded. In fact, PTO's complaint against petitioner specifically stated that, "[o]n or about January 15, 1999, [petitioner] did not answer questions and/or otherwise evaded answering questions posed in a Requirement for Information." C.A. App. 5948. The complaint further averred that petitioner's conduct violated "Rule 10.23(b)(5), in that [petitioner] engaged in conduct that is prejudicial to the administration of justice." *Ibid.* Those averments put petitioner on notice of the evasion charge. See generally 5 U.S.C. 554(b)(3) (requiring notice of the "matters of fact and law asserted"); 37 C.F.R. 10.134(a)(2) (requiring that "[a] complaint instituting a disciplinary proceeding shall * * * [g]ive a plain and concise description of the alleged violations of the Disciplinary Rules by the practitioner").

In any event, petitioner's fact-bound contention does not implicate a division in authority and does not warrant further review. Indeed, the court of appeals did not specifically address that contention, stating instead that it had "considered [petitioner's] remaining constitutional arguments and f[ou]nd them unpersuasive." Pet. App. 17a.

Nor is there is any merit to petitioner's argument (Pet. 24) that PTO's regulations are impermissibly vague because they do not specify that "'otherwise evading answering' questions in an * * * RFI is miscon-

duct"—another argument the court of appeals did not specifically address in its opinion. A regulation need not achieve "mathematical certainty" or "meticulous specificity." *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). Instead, because it is impossible to predict the myriad of situations that might arise, a regulation need only be "sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require." *Freeman United Coal Mining Co.* v. *Federal Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) (citations omitted). That standard was satisfied here. PTO's regulations prohibit practitioners from "[e]ngag[ing] in conduct that is prejudicial to the administration of justice." 37 C.F.R. 10.23(b)(5). And as petitioner concedes (Pet. 24-25), the RFIs themselves further specify that recipients have a duty to cooperate. Thus, petitioner was on fair notice that the types of evasive answers at issue here were prohibited by PTO's rules. See Pet. App. 53a-55a.

4. Petitioner next contends (Pet. 25-27) that PTO violated the "separation of functions" clause of the Administrative Procedure Act, 5 U.S.C. 554(d), because the same PTO employee, Harry Moatz, investigated petitioner and then convened the Committee on Discipline. That fact-bound contention, which the court of appeals did not specifically address in its opinion, lacks merit and does not warrant further review.

Section 554(d)(2) provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, *participate or advise in the decision, recommended decision, or agency review*

pursuant to section 557 of this title, except as witness or counsel in public proceedings." 5 U.S.C. 554(d)(2) (emphasis added). Moatz did not "participate or advise" in any decision as to the merits of petitioner's disciplinary proceeding. Instead, Moatz simply took the initial procedural step of assembling the group responsible for making the probable cause determination, just as a criminal prosecutor brings a matter before a grand jury. See 37 C.F.R. 10.132(a). The committee members themselves, not Moatz, then determined that there was probable cause to believe that petitioner had violated a disciplinary rule. See 37 C.F.R. 10.132(b), 10.4(b).

In any event, a mere decision that probable cause exists to justify the filing of charges and commencement of an adjudicative proceeding does not constitute a "decision" or "recommended decision" within the meaning of Section 554(d). Indeed, the requirements of Section 554 generally apply only in the context of "adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. 554(a), whereas a probable cause determination is merely a *precursor* to initiation of the adjudicative process. See, *e.g.*, *International Tel. & Tel. Corp.* v. *Local 134, Int'l B'hood of Elec. Workers*, 419 U.S. 428, 441-448 (1975); *Gibson* v. *FTC*, 682 F.2d 554, 560 (5th Cir. 1982) ("[P]articipation of [the same individual] in both the investigation and subsequent prosecution of a case is clearly allowed under 5 U.S.C. § 554(d)."). And as the text of Section 554(d) makes clear, the "recommended decision" and "decision" referenced in that subsection refer to the adjudicative decision made on the *merits* after "reception of evidence" in accordance with 5 U.S.C. 556 and 557, not to mere exercises of investigative or prosecutorial

discretion regarding whether to initiate formal proceedings.

After the committee made its probable cause determination, Moatz filed an administrative complaint against petitioner and prosecuted him before an ALJ. After the ALJ's initial decision, the PTO General Counsel, without Moatz's participation or advice, wrote the final decision.[2] Thus, at all relevant times, Moatz was either an investigator or a prosecutor; he was never a participant or advisor in the initial or final decision.

5. Finally, petitioner argues (Pet. 27-29) that the core violations forming the basis of the administrative complaint against him accrued outside of the five-year limitations period set forth in 28 U.S.C. 2462. Petitioner forfeited that claim by not raising it until his petition for rehearing in the court of appeals. Because the primary function of most statutes of limitations is to protect defendants against stale or unduly delayed claims, the law generally treats such statutes as providing an affirmative defense that a defendant must raise at the pleadings stage or suffer forfeiture or waiver. See, *e.g.*, *Day* v. *McDonough*, 547 U.S. 198, 202 (2006). While courts must consider *jurisdictional* questions sua sponte, petitioner does not argue that Section 2462's limitations period is jurisdictional, and courts have held that it is not. See, *e.g.*, *Canady* v. *SEC*, 230 F.3d 362, 363-364 (D.C. Cir. 2000) (holding that registered securities broker forfeited Section 2462 limitations defense by not timely raising it). In any event, this Court does not ordinarily

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[2] PTO's regulations call for the "Commissioner" to decide appeals. 37 C.F.R. 10.156. After promulgation of the relevant regulation, Congress changed the title of the head of PTO from "Commissioner" to "Director." See *Kroll*, 242 F.3d at 1362 n.1. And on January 31, 2002, the Director delegated the relevant authority to the General Counsel.

decide questions that were neither pressed in a timely manner nor passed upon below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2008